

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Implementation of)	
the Pay Telephone Reclassification)	CC Docket No. 96-128
and Compensation Provisions of)	
the Telecommunications Act of 1996)	
)	
RBOC/GTE/SNET Payphone Coalition)	NSD File No. L-99-34
Petition for Clarification)	

COMMENTS OF COMMUNIGROUP OF K.C, INC.,
D/B/A CGI, COMMUNIGROUP OF JACKSON, INC., NTS
COMMUNICATIONS, INC., VARTEC TELECOM, INC.,
TRANSTEL COMMUNICATIONS, INC., AND
CENTURYTEL LONG DISTANCE, LLC

The undersigned switch-based long distance resellers (the “Joint Switch-Based Resellers” or “JSBRs”) respectfully submit these comments to the Commission in response to the Further Notice of Proposed Rulemaking (FCC 03-119) released in the payphone compensation docket on May 28, 2003 and published in the Federal Register on June 2, 2003.

Summary

The system under which the first facilities-based interexchange carrier to handle the call (the “IXC”) pays the Payphone Service Provider (“PSP”) and in turn seeks reimbursement from the switch-based-reseller (“SBR”) has worked well in the eighteen months in which it has been in effect. Consequently, the Commission should reaffirm and readopt that system. Additionally, the Commission should clarify a recent payphone declaratory ruling by confirming that a PSP may not bypass its remedy against the facilities-based IXC and seek recovery directly from a SBR that has not agreed to pay the PSP directly. Permitting the PSP to bypass its

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 (“Joint SBRs”)
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remedy against the first facilities-based IXC and proceed directly against an unconsenting SBR will unfairly expose the SBR to double payment liability and return the industry to an unworkable system in which it is unclear whether the SBR or the IXC must pay for any given payphone call. Resolving this point is a key part of the answer to the question on which the Commission sought comment: whether the IXC or the SBR should pay the PSP.¹

The double payment liability risk exists because SBRs are under contractual obligations to pay their facilities-based IXC supplier for each payphone call on a monthly basis. This obligation is generally enforceable by the contract right of the facilities-based IXC to put the SBR out of business by discontinuing service for non-payment. The facilities-based IXC accumulates these monthly payments and then has the funds available to make the quarterly payments to the PSPs. If the PSP is permitted to seek its quarterly recovery directly from the SBR, the SBR in all likelihood will have already paid the facilities-based IXC its regular monthly payments for the same calls. Even if the SBR by chance has not yet paid the facilities-based IXC, chaos and litigation will ensue as the SBR would then be under two competing mutually inconsistent obligations: (1) a rule-based obligation to pay the PSP, and a (2) contract-based obligation to pay the facilities-based IXC.

Finally, to the extent the Commission desires to provide additional security of payment for the PSP, there are better ways than exposing the SBR to double payment liability, including

¹ See *Further Notice of Proposed Rulemaking*, FCC 03-119, para. 1 (seeking comment on “whether we should amend our rules ... to clarify which facilities-based carrier, either the IXC or the switch-based reseller, is responsible for tracking coinless payphone calls and compensating PSPs for those calls.”)

requiring the IXC to hold SBR payments in trust for the benefit of the PSPs and to account to the SBR and the PSPs for the IXC's use of SBR payments. Suggested rule text is attached.

1. *Successful Implementation of the Second and Third Orders on Reconsideration.*

Following adoption of the *Second Order on Reconsideration*, which established the first-facilities-based IXC as the party responsible for paying the PSP directly, the JSBRs and their primary facilities-based IXC commenced discussions regarding how to implement the Order.² The facilities-based IXC demanded that the JSBRs pay it for every payphone call that it delivered to the JSBRs, whether or not the call was completed. Then the Commission issued the *Third Order on Reconsideration*, which affirmed that only calls answered by the called party are compensable completed calls.³

Consistent with the Commission's framework, the facilities-based IXC and the JSBRs then signed contracts under which (1) the facilities-based IXC bills the JSBRs monthly for each payphone call, completed or uncompleted, (2) the JSBRs pay for all the calls but report back to the facilities-based IXC the number of calls that were completed, and (3) the facilities-based IXC credits the JSBR for the uncompleted calls (total calls less completed calls) on the next monthly bill. Thus, as contemplated by the Commission, the facilities-based IXC has taken responsibility for tracking calls, but has procured the assistance of its customers, the JSBRs, where necessary to

² *Second Order on Reconsideration, Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 16 FCC.Rcd. 8098 (2001), *remanded*, 315 F.3d 369 (D.C. Cir. 2003) (remand based on lack of publication of Notice of Proposed Rulemaking in the Federal Register, not the merits of the Commission's substantive determinations).

³ *Third Order on Reconsideration*, 16 FCC.Rcd. 20922, para. 7 (2001).

determine whether calls complete.⁴ The JSBRs have every incentive to deliver call completion reports on a timely basis to the facilities-based IXC, for otherwise they will receive no credit and will end up paying for completed and uncompleted calls, indirectly over-paying the PSP. The JSBRs have performed under these contracts for almost 18 months now.

The mechanism for paying the facilities-based IXC sheds light on the double payment risk. Each month the facilities-based IXC issues a bill for the number of minutes of wholesale long distance service purchased by the JSBRs in the previous month. Separately itemized on this bill is a charge equal to the number of payphone calls during that month multiplied by the price per call (which is the Commission rate of 24 cents per call plus an administrative factor). Payment is due 30 days after issuance of the bill. Thus, within 60 days of the transmission of the call, the JSBRs will have paid the first-facilities based IXC.

Meanwhile, the PSP's request for payment to the IXC is prepared and delivered on a far slower schedule. Within one-year after the end of the quarter in which the call is made, the PSP must deliver a list of its ANI with a request for payment to the facilities-based IXC. The JSBRs understand that the PSP or its clearinghouse typically delivers the ANI list and request for payment approximately 30 days after the end of the quarter in which the call is made. The facilities-based IXC then verifies the payment request and pays the amount verified, using funds already collected from the SBRs through regular monthly billing.

If the PSP is permitted to proceed against the SBR directly, this system breaks down. Even if the SBR could safely delay payment to the IXC while reviewing the PSPs' bill, which it

⁴ *Third Order on Reconsideration*, 16 FCC.Rcd. 20922, para. 10 (2001).

cannot because of the risk of disconnection, the SBR will in all likelihood have already paid the facilities-based IXC on a monthly basis by the time it receives a quarterly bill from the PSP.⁵

2. *Clarification/Modification of Commission Orders*

Read as a whole and in context, the Commission's Orders do not support the view that the PSP may bypass the facilities-based IXC and proceed directly against an SBR that has already paid the IXC, although read selectively they may contain sufficient maneuvering room to permit a PSP to attempt such a claim. This maneuvering room will increase after the expiration on September 30, 2003 of the stay of the D.C. Circuit Court Order vacating the *Second Order on Reconsideration*, if the Commission has not acted in this rulemaking by that date.

The Commission's rules as adopted in the *Second Order on Reconsideration* sharply distinguish between the PSP's right to collect from the IXC and the IXC's right to collect from the SBR. The rules nowhere mention or contemplate a direct action by a PSP against a non-consenting SBR:

Except as provided herein, the first facilities-based interexchange carrier to which a completed coinless access code or subscriber toll-free payphone call is delivered by the local exchange carrier shall compensate the payphone service provider ...

The first facilities-based interexchange carrier to which a compensable coinless payphone call is delivered by the local exchange carrier may obtain reimbursement from its reseller and debit card customers for the compensation

⁵ A SBR fortunate enough to have secured an indemnification clause in its contract with the facilities-based IXC to protect it against double payment liability would still have to go through the administrative ordeal of performing three transactions for each payphone call: (1) pay the IXC, (2) pay the PSP, and (3) prosecute and prevail on the indemnification claim against the IXC. Prevailing on the indemnification claim will be difficult because the IXC's bill to the SBR will not identify which PSPs are associated with the payphone calls for which the IXC is charging the SBR, making it hard for the SBR to prove it has paid twice.

amounts paid to payphone service providers for calls carried on their account and for the cost of tracking compensable calls.⁶

Moreover, the rule permits alternative arrangements, such as a PSP proceeding directly against a SBR, only if the parties (including the SBR and not just the PSP) so agree:

Facilities-based carriers and resellers may establish or continue any other arrangements that they have with payphone service providers for the billing and collection of compensation for calls subject to § 64.1300(a), if the involved payphone service providers so agree.⁷

Finally, the Commission seemingly nailed down the point by referring to an agreement by the SBR to pay the PSP as an agreement that “assume[s] liability,” meaning takes on a liability which would not otherwise exist.⁸

However, these clear rules are muddled by a statement in the Commission’s recent *Flying J Order*:

Are FBRs [Facilities-Based Resellers] responsible to compensate PSPs when FBRs’ customers use PSP’ payphones to make “dial-around” phone calls? As discussed, we answer this question in the affirmative.⁹

This passage refers to a compensation duty owed by “FBRs” or “Facilities-Based Resellers,” a term that may or may not be the same as “SBR” or “Switch-Based Reseller.” Because the *Second and Third Orders on Reconsideration* and the actual rule adopted by them (Rule

⁶ 47 CFR Secs. 64.1300(a), 64.1310(b).

⁷ 47 CFR Sec. 64.1310(b) (emphasis added).

⁸ *Third Order on Reconsideration*, 16 FCC.Rcd. 20922, para 12 (“the first IXCs would no longer be responsible for payment of compensation on behalf of SBRs that assume direct liability for compensable calls through private contractual agreements with PSPs.”) (emphasis added).

⁹ *Flying J, Inc. and Ton Services, Inc. Petition for Expedited Declaratory Ruling Regarding a Primary Jurisdiction Referral from the United States District Court for the District of Utah, Northern Division*, ___ FCC.Rcd. ___, FCC 03-108, para. 7 (May 9, 2003).

64.1310(b)) require the SBR to pay the facilities-based IXC, Flying J must be read as permitting the SBR to discharge any duty it has to the PSP by paying the IXC.¹⁰ The issue of double liability is not addressed in the *Flying J* decision and does not appear to have been involved in that case, which was a dispute between two PSPs and one interexchange carrier. In short, *Flying J* read in isolation creates questions that invite litigation, but read fairly does not endorse or support imposing double liability on SBRs.

Given the *Flying J* decision and the need for clear rules as the industry moves forward, the JSBRs urge the Commission to clarify (and as necessary modify) its rules to establish that (1) both facilities-based IXCs and SBRs have compensation and tracking responsibilities, (2) the facilities-based IXC's responsibilities run to the PSPs, and (3) the SBR's responsibilities run to the IXC, and may be discharged by paying the IXC and providing any necessary call completion information to the IXC. The only exception for calls completed after the effective date of the *Second Order on Reconsideration* would be if the SBR and the PSP have contractually agreed to direct payment by the SBR to the PSP.¹¹ For earlier calls, the only exception would be if the SBR has identified itself to the IXC as taking responsibility for paying the PSP directly.¹² Such rules accurately implement the Commission's basic principle that the long distance carrier that primarily benefits from the payphone calls should ultimately bear the cost of paying the

¹⁰ 47 CFR Sec. 64.1310(b).

¹¹ 47 CFR Sec. 64.1310(b); *Second Order on Reconsideration*, 16 FCC.Rcd. 8098, para. 21.

¹² *Bell Atlantic-Delaware, Inc. v. Frontier Communications Services, Inc.*, 16 FCC.Rcd. 81112, para. 15 (2001) ("the logical construction of the language from the Coding Digit Waiver Order requires a first-facilities-based carrier to pay [the PSP] unless the reseller has identified itself to the first facilities-based carrier as being responsible for paying compensation.").

compensation. Through paying the IXC, the SBR ultimately bears the cost of paying the PSP once and only once for each completed payphone call.

3. *Reasons why Permitting Double Payment Liability is Poor Policy*

The inequity of requiring a SBR to pay twice for the same payphone calls is the most obvious reason for requiring the PSP to pursue the IXC for payment.

Additionally, any system allowing the PSP to choose whether to proceed against the IXC or the SBR for payment of payphone compensation perpetuates the confusion that the *Second Order on Reconsideration* sought to end.¹³ Without a rule that avoids double payment, the SBR will not know, for any given invoice, whether to pay the PSP or the IXC. Conversely, the PSP may not know whether the IXC or the SBR is expecting to pay and therefore have difficulty determining to whom to send its ANI and request for payment. Bill verification would become more time consuming and burdensome if the PSP can directly request payment from either the SBR or the IXC. Before paying the PSP, the SBR and the IXC would each need to investigate to ensure that the other has not already paid the PSP, and therefore would have to match up the IXC's records (which may involve payphone calls handled by many SBRs) with the SBR's records. Where this is difficult, unscrupulous PSPs which bill both the SBR and IXC may be paid twice.

Moreover, any system allowing the PSP to proceed against a non-consenting SBR would also provide the IXCs with a substantial artificial competitive advantage over the SBR in the retail long distance market. Where it is unclear whether the SBR or the facilities-based IXC

¹³ See *Further Notice of Proposed Rulemaking*, FCC 03-119, paras. 10, 14 (describing pre-2002 system in which SBRs paid some PSP invoices and IXCs paid other PSP invoices and tentatively concluding that "we do not believe it is feasible or appropriate to return to that system.")

must pay the PSP, as is the case if both are liable, the facilities-based IXC can wait and see if the SBR pays. The worst that can happen to the facilities-based IXC is an enforcement action by the PSP. By contrast, as discussed above, the SBR as a practical matter cannot wait to pay the facilities-based IXC, given the power of the facilities-based IXC to disconnect the SBR for non-payment. Thus the double payment risk falls on the SBR but not the facilities-based IXC. Ultimately, if double liability is allowed, the SBR in serving its retail customer may pay twice for many payphone calls, while the facilities-based IXC in serving its retail customers will never have to pay more than once. Consumers will be the ultimate losers if competitively-priced SBR products can no longer be sustained.

The JSBRs are aware that the PSPs like other businesses may have suffered at least some losses due to recent bankruptcies of major facilities-based IXCs. Bankruptcy risk is inherent in any business, and there is no fairness or equity in allowing the PSP to protect itself from bankruptcy risk by requiring the SBR to pay twice, once to the facilities-based IXC and once again to the PSP. *See* 47 U.S.C. Sec. 276(c)(1) (PSPs to be “fairly” compensated).

In the event the Commission feels it is appropriate to give the PSPs additional protection from IXC bankruptcies, the following options are open to the Commission and do not involve burdening the SBRs with double payment exposure:

- Declare that IXCs hold SBR payments in trust for the benefit of the PSPs, so that they cannot become bankruptcy estate assets.¹⁴

¹⁴ 11 U.S.C. Sec. 541(d); *Begier v. I.R.S.*, 496 U.S. 53, 57 (1990); *Mid-Atlantic Supply, Inc. v. Three Rivers Aluminum Co.*, 790 F.2d 1121, 1126 (4th Cir. 1986) (“[I]f a trust, whether express, statutory or constructive, is established over property in the possession of the trustee or debtor in possession, the sole permissible administrative act of the trustee or debtor in possession is to pay over or endorse over the property to the beneficiary or beneficiaries of the trust.”)

- Require IXC's to place SBR payments in separate accounts designated as trust accounts, in order to make clear the trust status of the accounts.
- To ensure compliance with these rules, require IXC's upon request from the SBR or the PSP to account for how the IXC used the SBR's payment, and require an officer of the IXC to file an annual compliance certificate with the Commission.

These rule changes provide substantial further protection of the PSP without exposing the SBR to double payment liability and without establishing a chaotic system in which the PSP may choose whether to seek payment from the IXC or the SBR. Suggested rule text is attached for the Commission's consideration.

The proposed requirement that the IXC account to the PSP and SBR will help the Commission in enforcing the payphone compensation rules. PSPs have an obvious self-interest in investigating to ensure that the facilities-based IXC uses SBR funds to pay them. Also, the SBR will want to ensure that the facilities-based IXC is not keeping the SBR's payments for itself, thereby effectively reducing its costs and gaining a competitive advantage over the SBR in the long distance market.

Conclusion

The system adopted in the *Second and Third Orders on Reconsideration* in which the first facilities-based IXC pays the PSP and seeks reimbursement from the SBR has worked well and should be reaffirmed. If the Commission desires, it may fine tune that system by requiring that IXC's hold payments from the SBR in trust for the benefit of the PSP and account to the SBR and PSP for their use of SBR payments. In no event should the Commission expose the SBRs to the risk of having to pay twice, once to the IXC and once to the PSP, for the same payphone call.

Respectfully submitted

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Exhibit A

Proposed Rule Language (Changes Underlined)

(CommuniGroup of K.C., Inc. et al. - "Joint Switch-Based Resellers")

§ 64.1310 Payphone compensation payment procedures.

(a) ...

(b) (1) The first facilities-based interexchange carrier to which a compensable coinless payphone call is delivered by the local exchange carrier may obtain reimbursement from its reseller and debit card customers for the compensation amounts paid to payphone service providers for calls carried on their account and for the cost of tracking compensable calls. Other than such liability to the first facilities-based interexchange carrier for such reimbursement, the reseller and debit card customer shall have no liability to any person to pay payphone compensation. Facilities-based carriers and resellers may establish or continue any other arrangements that they have with payphone service providers for the billing and collection of compensation for calls subject to § 64.1300(a), if the involved payphone service providers so agree.

(2) To the extent that the first facilities-based interexchange carrier collects monies from its reseller or debit card customers in advance of paying the payphone service provider, the first facilities-based interexchange carrier shall hold such sums (exclusive of compensation for the cost of tracking compensable calls) in trust and in dedicated accounts separate from its general accounts for the benefit of the appropriate payphone service providers. Upon request from a reseller, debit card customer, or a payphone service provider, the first facilities-based IXC shall provide evidence of payments by it to payphone service providers associated with the payments to it by the reseller or debit card customer. The first facilities-based carrier shall provide such evidence whether it collects from the reseller or debit card customer in advance of or after paying the payphone service provider.

(3) Each first facilities-based interexchange carrier shall file with the Commission an annual certificate certifying compliance with § 64.1310(b) and executed under oath by an officer of the company with responsibility for supervising payments of compensation to payphone service providers.

(c) – (e) ...